

No. 14697

United States
Court of Appeals
for the Ninth Circuit

KETHEL OSBORNE, Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary,
Alcatraz, California, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

JUL 11 1957

PAUL H. GARDEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

PETITIONER AND APPELLANT Pro Per

Box 1055,
Alcatraz, California.

LLOYD H. BURKE,
United States Attorney,
Post Office Building,
San Francisco, California.

RICHARD H. FOSTER,
Asst. United States Attorney,
Post Office Building,
San Francisco, California,
Attorneys for Respondent and Appellee.

In the United States District Court for the North-
ern District of California

No. 33856

KETHEL OSBORNE, No. 1055,
Petitioner Pro. Per.,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Al-
catraz, California, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now Kethel Osborne herein after called the petitioner respectfully moves this honorable court to issue a writ of habeas corpus requiring the respondent herein to produce the petitioner before this court and show cause why the petitioner should not be released forthwith from the illegal restraint of his liberty by the respondent.

In support of his petition the petitioner states as follows:

1. That he is a citizen of the United States.
2. That he is of legal age.
3. That he is presently confined in the United States Penitentiary at Alcatraz, California.
4. That he is confined under the color of a commitment from the judge advocate general of the Army, Commitment No. 365832.
5. That this commitment is promulgated on a conviction in violation of the uniform code of military justice, Art. 125, Sodomy; and 128, assault by a general court martial.

6. That petitioner is serving a sentence of eight years at hard labor entered on June 9, 1953.

7. Petitioner is confined in the United States Penitentiary, Alcatraz, California, which is within the jurisdiction of this court.

8. Petitioner proceeding pursuant to Title 28 USCA Sec. 2241, habeas corpus statute.

9. Your petitioner before applying to this court for a writ of habeas corpus has exhausted all legal remedies that are available to him as provided by Art. 73 and 67, U.C.M.J., M.C.M., 1951, and as required by the Federal Statute giving this court full jurisdiction over petitioner, for granting the issuance of a writ of habeas corpus pursuant to Title 28 Section 2241, habeas corpus statute. And as petitioner presents jurisdictional contentions, this court has full jurisdiction to determine the issue whether the issuance of a writ of habeas corpus should be granted.

Brief Statement of Case

1. Petitioner was tried by a general court martial at the branch United States disciplinary barracks at Lompoc, Calif., on June 9, 1953. The specifications was Sodomy and Assault in violation of the uniform code of Military Justice herein referred to as U.C.M.J.

2. The alleged offenses is to have taken place on April 30, and May 1, 1953, petitioner pleaded not guilty, petitioner was found guilty of all charges and specifications on June 9, 1953 by a General Court Martial, C.M. 365832.

3. Petitioner was placed incommunicado on May

1, 1953, petitioner was informed of the charges against him on May 12, 1953 while still incommunicado, the charges was read and served on petitioner by Major Thomas M. Love Supr. of Prisoners of the branch United States Disciplinary Barracks, Lompoc, Calif.

4. Charges was forwarded with recommendations as to disposition by Col. Harry L. Phillips, Commanding officer of the Branch United States Disciplinary Barracks, Lompoc, Calif.

5. Charges was investigated by First Lt. Henry J. Idker, 6103 ASU, Branch United States Disciplinary Barracks, Lompoc, Calif. Whom shall from herein be called Lt. Ideker.

6. Petitioner first met Lt. Ideker on the 28th of May 1953 when he called petitioner down to an office used by the Sergeant of the Guards at the United States Disciplinary Barracks at Lompoc, Calif. At the time petitioner was called down to the office by Lt. Ideker, petitioner was being kept in segregation block where petitioner was kept before and after the trial.

7. Petitioner was informed by Lt. Ideker that he had been appointed an investigating officer to investigate petitioner's case, Lt. Ideker asked petitioner if he wanted to make a statement and petitioner answered in the negative.

Petitioner asked Lt. Ideker and Major Thomas M. Love if he could write some letters of try and obtain counsel a civilian for his defense, petitioner was told he could do so as soon as he returned back to segregation block. On returning to segregation

block petitioner was told he could not write a letter and that it was an order from Major Thomas M. Love, Supr. of prisoners of the United States Disciplinary Barracks, Lompoc, Calif.

Petitioner also asked Lt. Ideker if he was going to be confronted with the witnesses against him when they would make their statements.

Lt. Ideker informed petitioner that the witnesses had already made their statements.

Petitioner asked Lt. Ideker if he could see the statements made by the witnesses against him and was informed that he could not see the statements.

Petitioner asked Lt. Ideker could he see the Medical Officer, Capt. Alfred W. Stratton attached to the hospital at the U.S. Disciplinary Barracks, Lompoc, Calif., and expert witness in petitioner's case who had performed a rectal examination on the alleged victim, Lt. Ideker informed petitioner that he had obtained a statement from the medical officer Capt. Alfred W. Stratton but the petitioner was not allowed to see any of the statements.

Petitioner after leaving the segregation block became involved in more trouble and was going to be given another court martial. Petitioner was told that if he would sign a receipt for the approval of his last court martial that the petitioner would be shipped away.

Petitioner was told at the time he signed the receipt he was only letting the War Department know that the petitioner wanted to become a sentence prisoner with the approval he received from the reviewing authorities at Camp Roberts, Calif., and

did not want to wait for the ones to come from Wash.

At the time of signing the receipt, petitioner was in solitary incommunicado and was told that if he did not sign the receipt he would be court martialed for another violation of the U.C.M.J.

Upon being shipped out petitioner has petitioned the Military Court of Appeals for a granting of a review of petitioner's case petition was denied.

Contentions

Petitioner contends that he is being restrained of his liberty without Due Process of Law specifically that the General Court Martial that tried the petitioner did not have competent jurisdiction over petitioner or over subject matter.

Petitioner contends that the reasons are as follows:

(1) That the placing of petitioner in incommunicado before and after trial was a violation of petitioner's rights under the Constitution Amend. VIII. Which states in part: "No cruel or unusual punishment shall be inflicted."

(2) That failure of the Military Court of Appeals to let petitioner appeal his case pursuant to the provisions of the Uniform Code of Military Justice Art. 6, 7, after petitioner sent a letter to the Court stating why he had not heretofore institute an appeal, petitioner's reasons are as follows:

A—I was Court Martialed on June 9, 1953 and placed incommunicado until August 3, 1953.

B—I was not advised of my rights to appeal,

petitioner was however advised by a member of the Judge Advocate office at the Disciplinary Barracks where petitioner was confined at that he the petitioner could not appeal his case and if he tried to he would be court martialed for another violation of the U.C.M.J.

C—I was not aware after discovering my rights to appeal that there was a time limit thereon.

D—I have been moved about several times in the past ten months and therefore have been in an unsettled condition. Petitioner contends that failure of the court of Military Appeals to let petitioner appeal his case pursuant to rule 30 of the United States Court of Military Appeals, Rule of practice and procedure was a denial of petitioner's rights under Art. 6, 7, U.C.M.J.

E—That failure of law officer to instruct the court on reasonable doubt prejudice to petitioner's rights. Although the member was instructed as to elements of the offense and that the accused must be presumed to be innocent until his guilt is established by competent evidence beyond reasonable doubt it has been held, that if the court is not instructed upon the meaning of the term reasonable doubt, it is prejudice to rights of an accused, C.C.A. 20 F.(2d) 376.

F—That failure of the reviewing authorities to disapprove petitioner's sentence for insufficient evidence pursuant to Art. 66 of the UCMJ was a denial of petitioner's rights under Art. 66.

G—That failure of the investigating to have petitioner present when witnesses against petitioner

gave their statements was a violation of petitioner's rights under the UCMJ and the Const. Amend. 6 and Art. 32.

H—That failure to let petitioner talk to the witnesses in his favor as required by the UCMJ Art. 32 and the Const. Amend. 6.

I—That Art. 31 was not read to the petitioner at any time during the investigation as required by the UCMJ, Art. 32.

J—That petitioner was not advised of his rights under Art. 31, UCMJ.

K—That petitioner's case was not investigated in compliance with Art. 32 UCMJ M.C.M. 1951 which states in part: "No charges or specifications shall be referred to a General Court Martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made, this investigation shall include as to the truth of the matters set forth in the charge, and the accused shall be advised of the charges against him and of his rights to be represented at such investigation by counsel, upon his own request he shall be represented by civilian counsel if provided by him, or Military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising General Court Martial jurisdiction over the command and full opportunity shall be given to the accused to cross-examine witnesses against him if they were available and present, anything he may desire in his own behalf either in defense or mitigation, and the investigating officer

shall examine available witnesses requested by the accused.

That petitioner was not given the opportunity to obtain Military counsel of his own selection.

Petitioner contends that these requirements are mandatory and indispensable requisites, these requirements are so mandatory that the Congress has enacted an article in the Uniform Code of Military Justice to punish any person who fails to comply with any provision of Code regulating the proceedings before or after trial.

That Art. is Art 98 of the Uniform Code of Military Justice which states:

“Any person subject to this code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code, or knowingly and intentionally fails to enforce or comply with any provision of this regulating the proceedings before or after trial of an accused, shall be punished as a court martial may direct.”

Petitioner contends that if the required requisites are not complied with a court martial is without jurisdiction to try an accused or the subject matter, the jurisdiction of a court martial depends upon compliance with the statutory regulations and Constitution provisions that govern them.

Argument and Memorandum of Law

(1) The jurisdiction of a court martial does not depend upon where an offense is committed or whether the accused is member of the Armed

Forces, there jurisdiction is condition on indispensable requisites and statutory regulation and constitutional provisions that govern them, especially due process of law, Amend. V and Art. 32-34, of the U.C.M.J. The nature of a court martial is described in *McClaghry vs. Dering* 186, U.S. 49, 62, 22, S.Ct. 786, 791, 46 L.Ed. 1049; as follows, "A court martial is a creature of statute and as a body or tribunal it must be convened and constituted in entire conformity with the provision of the statute or it is without jurisdiction." Citing Justice Waite, in *Runkle vs. United States*, 122 U.S. 543, 555, 7 S.Ct., 1141, 30 L.Ed. 1167: "A court martial organized under the laws of the United States is a court of special and limited jurisdiction, such is also the effect of the decision in *Wise vs. Withers*, 3 Cranch 331, 2 L.Ed. L57. To give effect to the sentence of a court martial it must appear that the court had jurisdiction and that all the statutory regulations governing its proceedings had been complied with, citing Marshall in *ex parte Watking* 3 Pet., 193, 209, 7 L.Ed. 650, 655; *Dynes vs. Hoover*, 20, How. 65, 80, 15, L.Ed. 838; *Mills vs. Marten*, 19, John, N.Y. 7-33; *Anthony vs. Hunter*, 71 F. Supp., 823:

Petitioner contends that due process of law in a Military tribunal is that prescribed in the Military Code enacted by the Congress, and regulations authorized by the President thereunder, the accused must be given a fair opportunity to prepare his defense, for the rights of an accused is fundamental rights and a person is unlawfully restrained of his

liberty when he is deprived of some right he is lawfully entitled to under the Constitution of the U. S.

Petitioner contends that failure of a court martial to comply with the mandatory articles deprives it of jurisdiction to try an accused, which may be acquired only by following the Mode designated by the statute, for the purpose of a pretrial investigation is to prevent trial on insufficient evidence and to protect an accused from unfounded and trivial charges and to give him an opportunity of probing into the charges against him and to uncover evidence which might lead to his exculpation, citing, *Henry vs. Hodges* 76 F.Supp. 968;

It is for these reasons and the allegations that has been set forth, that petitioner prays that a Writ of Habeas Corpus be issued and the relief be granted to petitioner thereunder by this Honorable Court who has the General jurisdiction and is charged with the responsibility of inquiring into the legality of the detention of an accused.

Conclusion of Petitioner

It has been well established that the Military court that imposed sentence on petitioner, did not have jurisdiction over petitioner or the subject matter and that petitioner is being deprived of his liberty by virtue of a commitment made in violation of petitioner's Constitutional rights of due process of law.

Therefore petitioner prays that this honorable court will order the respondent to show cause why

petitioner should not be released forthwith from his illegal restraint by respondent.

Respectfully submitted,

/s/ KETHEL OSBORNE,

Petitioner pro per

Duly Verified.

[Endorsed]: Filed July 7, 1954.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 34217

KETHEL OSBORNE,

Petitioner,

vs.

E. B. SWOPE, Warden,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now K. Osborne, hereinafter called the petitioner who respectfully moves this honorable court to issue a writ of habeas corpus, requiring the respondent herein to produce the body of petitioner before this court on the 9th day of November, 1954, to show cause why the petitioner should not be released forthwith from the illegal restraint complained of hereinafter, verified under oath, to-wit:

1. That petitioner is in the custody of the re-

spondent above named, restrained of his liberty at U.S.P., Alcatraz, Calif., under color of a commitment issued from the Judge Advocate General of the U. S. Army, Commitment No. 365832; that petitioner was unable to obtain a copy of the commitment from the respondent; that this court has jurisdiction under 28 U.S.C. 2241, et seq.

2. That petitioner before applying to this court for the writ has exhausted his remedies provided by Art. 73 and 67, U.C.M.J. (1951); that this is the second application to this court for the writ, but is based upon new and distinct grounds.

3. That the said restraint and imprisonment are illegal and their unlawfulness consist in the following Facts and Circumstances, and not otherwise, to-wit:

Allegation I.

That the judgment and commitment are void and the General Court Martial board's judgment was without jurisdiction because a member of that court had threatened petitioner prior to trial, promising to find him guilty, irrespective of the evidence: That such action was of such a nature as to deprive the petitioner of due process as guaranteed by the United States Constitution (See: Exhibit A, annexed hereto and made a part hereof.)

Wherefore, your petitioner respectfully prays that the writ issue as prayed.

/s/ KETHEL OSBORNE,
Petitioner

I, Kethel Osborne, being duly sworn according to law, declare that I am the plaintiff herein, that all the facts as alleged are true as to my knowledge and belief, so help me God.

/s/ KETHEL OSBORNE

United States of America,
Northern District of California,
Southern Division—ss.

Subscribed and sworn to in my presence this 19 day of October, 1954.

[Seal] /s/ J. B. LATIMER,
Associate Warden authorized by the Act of Feb. 11,
1938, to administer oaths.

Certificate of Service

I hereby certify that a copy of the hereto annexed document and the foregoing petition were mailed this day to: The United States Attorney, of the court above entitled.

/s/ KETHEL OSBORNE, Petitioner

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT OF PETITIONER, KETHEL OSBORNE

Before me personally appeared the petitioner, above named, being duly sworn, according to law, who did depose and aver that the following is true

as to his knowledge and belief, to-wit: Affiant states that he was confined as a Military prisoner, at the United States Disciplinary Barracks, Lompoc, California, for alleged violation of the Uniform Code of Military Justice; that he does state that he was charged with violation of Article 28, U.C.M.J.; that the date was approximately on May 19, 1952.

Affiant states that he was tried before a General Court Martial Board; That affiant was found guilty and sentenced to three (3) years; that affiant was thereafter confined in the Barracks above named.

Affiant states that he had been confined in said Barracks about ten (10) months when he had an accusation made against him by T. M. Love, Super. of prisoner, who claimed that affiant had assaulted a prisoner named Herbert E. Carpenter; that this prisoner, Carpenter was a personal friend of the accuser and Captain Mark E. Kindred, who subsequently sat as a member of the Court Martial Board which tried affiant for the alleged assault.

Affiant states that on or about June 4, 1953, Captain Mark E. Kindred came to the Disciplinary Barracks to interrogate affiant about the alleged crime; that during the course of the conversation, at which no other persons were present, Captain Mark E. Kindred became enraged when affiant told him that it was Carpenter, the other prisoner, who had assaulted him, instead of vice versa; that Captain Mark E. Kindred shouted: 'That's a Goddamned lie! You can't tell me that kind of bullshit; that affiant protested and warned the Captain that his actions

were of such a nature as to hold court on the spot and that he was innocent no matter what the Captain believed. That as a result of the argument, Captain reached out and grabbed affiant by the throat and affiant was choked until he nearly became unconscious; that he feebly struck out to protect himself; that the Captain's rage was beyond control; that he loosened his grip and pointed an accusing finger at affiant and screamed: You black son of a bitch, the last time I was on the Board, I recommended that you get a light sentence, but, this time I'll fix you. I'm telling you right now that I'll be on this next Board and I'll find you guilty, no matter what kind of evidence you dig up. I'll see that you get the maximum; that the Captain continued to abuse and threaten with dire consequences and departed.

Affiant states that the conversations and threats are reported as accurately as memory serves; that all this occurred on or about June 4, 1953; that on June 9, 1953, affiant was put on trial; that he raised a vigorous defense, but true to his promise, Captain did in fact vote to viciously find the defendant guilty and recommended the maximum sentence; that such threats before trial and their subsequent fulfilment was contrary to law and justice. Further affiant sayeth not.

/s/ KETHEL OSBORNE, Affiant

United States of America,
Northern District of California,
Southern Division—ss.

[Seal] /s/ J. S. LATIMER,
Associate Warden authorized by the Act of Feb. 11,
1938 to administer oaths.

[Endorsed]: Filed November 17, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary at Alcatraz, State of California, appear before this Court on the 3rd day of December, 1954, at the hour of 9:30 a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary at Alcatraz, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney, his representative herein.

Dated: November 30, 1954.

/s/ OLIVER J. CARTER,
United States District Judge

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and for cause why a writ of habeas corpus should not issue, shows as follows:

I.

That petitioner is confined in the United States Penitentiary at Alcatraz, California, under and by virtue of the commitment of a General Court Martial approved on the 15th day of September, 1953.

II.

That petitioner moved the United States District Court for the Northern District of California for a writ of habeas corpus on July 7, 1954 in Civil No. 33856.

III.

That United States District Judge O. D. Hamlin on August 19, 1954, ordered that the petition for a writ of habeas corpus in Civil No. 33856 be denied.

IV.

That the petition for a writ of habeas corpus in the above entitled case presents no new ground not heretofore presented and returned by the United

States District Court for the Northern District of California on the prior application for a writ of habeas corpus in Civil No. 33856, and pursuant to Section 2244 of Title 28 United States Code the petition for habeas corpus should be denied.

V.

That petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice within 30 days after receipt of the decision of the Board of Review.

VI.

That the grounds urged by petitioner for a writ of habeas corpus do not show that the court martial by which he was tried was without jurisdiction. *Burns vs. Wilson*, 346 U.S. 147; *Humphrey vs. Smith*, 336 U.S. 695; *Hunter vs. Wade*, 169 F.2d 973; *Ex parte Benton*, 63 F.Supp. 808 (D.C.N.D. Cal., Goodman, J.).

Wherefore, respondent prays that the writ of habeas corpus be denied and the order to show cause discharged.

Dated: December 10, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By RICHARD H. FOSTER,

Asst. U. S. Attorney,

Attorney for Respondent

A copy of the foregoing Return was mailed today

to petitioner, Kethel Osborne, U. S. Penitentiary, Alcatraz, California.

Dated: December 10, 1954.

/s/ R. H. FOSTER

[Endorsed]: Filed December 10, 1954.

[Title of District Court and Cause.]

ORDER

Kethel Osborne filed a petition for habeas corpus alleging in substance that a member of the Court Martial which tried him was biased and prejudiced. The allegations of the return to the order to show cause heretofore issued by this Court were not traversed and will be accepted as true. 28 U.S.C. 2248. The return establishes that Osborne has heretofore filed a petition for habeas corpus before this Court; that the petition for a writ of habeas corpus presents no new grounds not heretofore presented on the prior application for a writ of habeas corpus; that United States District Judge O. D. Hamlin of this Court on August 19, 1954 ordered that the prior petition for a writ of habeas corpus be denied (Civil No. 33856), and that petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice within 30 days after receipt of the decision of the Board of Review.

It appearing that the legality of Osborne's detention has been determined by a Judge of this

Court on a prior application for a writ of habeas corpus and that the petition presents no new ground not therefore presented and determined, and being satisfied that the end of justice will not be served by further inquiry, and further finding that the claim of bias and prejudice is mere error which does not go to the jurisdiction of the Court Martial by which petitioner was tried, therefore, pursuant to Section 2244 of Title 28 United States Code and under the authority of *Burns vs. Wilson*, 346 U.S. 147; *Humphrey vs. Smith*, 336 U.S. 695; *Hunter vs. Wade*, 169 F.2d 973 and *ex parte Benton*, 63 F.Supp. 808,

It Is Ordered that a writ of habeas corpus in the above entitled case be, and the same is, denied, and the order to show cause heretofore issued be, and the same is, discharged.

Dated: December 22, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

PETITIONER'S ANSWER AND TRAVERSE

Your petitioner has today been served with copy of the government's Return to the petition for writ of habeas corpus heretofore filed and your petitioner denies the allegations therein in each and every respect and he now refers to the pleadings

heretofore filed with the same force and effect as that they were incorporated herein. The petitioner will present facts and evidence at the hearing.

/s/ KETHEL OSBORNE,
Petitioner

United States of America,
Northern District of California,
Southern Division—ss.

I, Kethel Osborne, hereby swear that I have read the contents of the above answer and traverse and that the contents therein are true as to my knowledge and belief.

/s/ KETHEL OSBORNE, Affiant

Subscribed and sworn to before me this date:
21st December, 1954.

[Seal] /s/ J. B. LATIMER,
Associate Warden authorized by the Act of Feb. 11,
1938 to administer oaths.

Proof of Service: I hereby swear that a copy of the foregoing was mailed today to United States Attorney, of the above entitled Court.

/s/ KETHEL OSBORNE, Petitioner

[Endorsed]: Filed December 23, 1954.

Court Clerk, U. S. District Court,
San Francisco, Calif.

Jan 16, 1955

Re: Civil No. 34217

Sir:

Please submit this letter to the Court as an informal motion to vacate the order dated Dec. 22, 1954, denying a Petition for a writ of habeas corpus.

I rely on the reason in the traverse mailed to the Court dated Dec. 21, 1954, and the following facts. The reason I did not answer the government's return was because due to a minor infraction of the institution's rules I was placed in the solitary confinement block and was therefore unable to answer the government return.

I am sincerely yours,

/s/ KETHEL OSBORNE

Respectfully submitted.

P.S.—In addition I submit the following reason why the writ should be granted.

(1) That the prosecution denied petitioner due process of law in that the army prosecutor knowingly used perjured testimony to deprive petitioner of his freedom.

I hereby swear that all I state is true.

/s/ KETHEL OSBORNE

Sworn to before me this 17th day of January,
1955.

[Seal] /s/ P. R. BERGEN,
Associate Warden authorized by the Act of Feb. 11,
1938 to administer oaths.

[Endorsed]: Filed January 20, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 34217

KETHEL OSBORNE, Petitioner,

VS.

E. B. SWOPE, Warden, Respondent.

ORDER DENYING MOTION TO VACATE OR-
 DER DENYING PETITION FOR HABEAS
 CORPUS

Petitioner moves to vacate the Court's order of December 22, 1954, denying his petition for habeas corpus and discharging an order to show cause previously issued. The ground of the motion is that petitioner was unable to traverse the respondent's return to the order to show cause until after the Court had denied his petition because he was held in solitary confinement. However, the traverse which petitioner now has on file does no more than

deny in toto the allegations of the return, nearly all of which state matters which are of record in this Court. Thus there is nothing in the traverse which would warrant any different ruling than that made.

The entirely new ground for relief which is asserted in the motion is not properly presented by way of motion to vacate the prior order.

The motion to vacate the Court's order of December 22, 1954 is therefore denied.

Dated January 24, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed January 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named petitioner appeals to the United States Appeal Court for the Ninth Circuit from the Orders of December 22, 1954 and January 25, 1955, denying a petition for a Writ of Habeas Corpus.

Dated January 31, 1955.

/s/ KETHEL OSBORNE,
Petitioner, pro se

PRAECIPE

To the Court Clerk:

Sir:

You will please take notice that I herewith sub-

mit the necessary papers to prosecute an appeal and this is to inform you that you will receive the \$5.00 fee within a matter of 15 days. You will please hold these papers until the money arrives and then you will file same.

Dated: January 31, 1955.

Respectfully submitted,

/s/ KETHEL OSBORNE,
Appellant, pro se

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

PRAECIPE OF TRANSCRIPT OF RECORD

To: Hon. C. W. Calbreath, Clerk:

Sir:

You will please prepare and certify a Transcript of Record to be used on appeal consisting of the following records:

1. Petition for Writ of Habeas Corpus, Civil No. 33856.
2. Petition for a Writ of Habeas Corpus, Civil No. 34217.
3. Order denying Petition (No. 34217) dated December 22, 1954.
4. Order denying motion to vacate, etc., (No. 34217) dated Jan. 25, 1955.
5. Notice of Appeal, dated Jan. 31, 1955.

6. Praecept of Transcript of Record, dated Jan. 31, 1955.

7. Motion to use records on appeal without costs, dated Jan. 31, 1955, and accompanying affidavit, dated Jan. 31, 1955.

You will please send me a copy of same so that I may use it to prepare a brief.

Dated: January 31, 1955.

Respectfully submitted,

/s/ KETHEL OSBORNE,
Petitioner, pro se

U.S. District Court

2/1/55

From Kethel Osborne, P.M.B. No. 1055, to Court Clerk.

Sir:

I am tending you this letter in order to let you know that I am appealing my case, Osborne vs. Swope, Civil No. 34217. In receiving this appeal dated Jan. 31st/55 you will notice that I contend that I am a pauper within the meaning of the statutes. It is true that at the time the appeal was dated I had in my account here at the institution the sum of \$40.00, but after I pay the \$5.00 filing fee to file my Notice of Appeal in this Court I will have \$35.00, \$25.00 of which I will have to pay to the Ninth Circuit Court of Appeal, which would then lieve me with \$10.00. I have requested that you prepare the records to be used on appeal for me, for which I will be thankful, for after paying filing fees

to both Court I will be a pauper within the meaning of the statute.

I am sincerely yours,
Respectfully submitted,

/s/ KETHEL OSBORNE

[Printer's Note]: Transmittal Slip for \$5.00 check attached.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

MOTION TO USE RECORDS ON APPEAL
WITHOUT PAYMENT OF COSTS

To: Hon. Louis E. Goodman:

Pursuant to Sections 1915 (A) and 2250 of title 28, United States Code, the petitioner moves the court for leave to use the following records on appeal without costs, relying on the affidavit annexed hereto and made a part hereof.

1. Petition for a Writ of Habeas Corpus, Civil No. 33856.
2. Petition for a Writ of Habeas Corpus, Civil No. 34217.
3. Order Denying the Petition (No. 34217), dated Dec. 22, 1954.
4. Order Denying Motion to Vacate, etc., (No. 34217) dated Jan. 25, 1955.
5. Notice of Appeal, dated Jan. 31, 1955.

6. Praecept of Transcript of Record, dated Jan. 31, 1955.

7. Motion to Use Records on Appeal Without Payment of Costs, dated Jan. 31, 1955.

Dated: Jan. 31, 1955.

/s/ KETHEL OSBORNE,
Petitioner, pro se

AFFIDAVIT OF KETHEL OSBORNE

Kethel Osborne being first duly sworn says:

1. That he is the petitioner in the process;
2. That he is a citizen of the United States;
3. That he is a pauper and is unable to pay costs of having certified Transcript of Record prepared;
4. That he files in good faith;
5. That he believes that he entitled to redress;
6. That the nature of the action is an appeal.

/s/ KETHEL OSBORNE, Affiant

State of California,
San Francisco County—ss.

Sworn to before me this 1st day of Feb. 1955.

[Seal] /s/ J. B. LATIMER,
Associate Warden authorized by the Act of Feb. 11,
1938 to administer oaths.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the appellant:

Petition for writ of habeas corpus in Cause 33856.

Petition for writ of habeas corpus in Cause 34217.

Order to show cause in Cause 34217.

Return to writ of habeas corpus in Cause 34217.

Order in Cause 34217.

Petitioner's answer and traverse in Cause 34217.

Motion to vacate order in letter form in Cause 34217.

Order denying motion to vacate order denying petition for habeas corpus in Cause 34217.

Notice of appeal in cause 34217.

Praecipe of transcript of record with letter attached.

Motion to use records on appeal without payment of costs.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 23rd day of March, 1955.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By WM. C. ROBB,

Deputy Clerk

[Endorsed]: No. 14697. United States Court of Appeals for the Ninth Circuit. Kethel Osborne, Appellant, vs. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.